

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

Docket No. 209,343

## ORDER

Claimant appeals the July 26, 1999 Award Review and Modification entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on December 1, 1999.

## APPEARANCES

Rodney C. Olsen of Manhattan, Kansas, appeared for the claimant. Gregory D. Worth of Lenexa, Kansas, appeared for the respondent and its insurance carrier.

## RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations set forth in the Award Review and Modification of the Administrative Law Judge.

## ISSUES

This is a claim for a 1994 accident that was settled based upon a 14 percent general body disability. Future medical and the right to review and modification were left open for two years from a time certain. Within that period claimant's low back condition worsened and surgery was performed on March 19, 1997 by Glenn M. Amundson, M.D., the authorized treating physician. Following surgery claimant had additional complaints regarding his right upper extremity and cervical area. An MRI examination revealed claimant had cervical stenosis and a herniated cervical disc. The Administrative Law Judge found claimant had additional impairment to his lumbar spine but found claimant had failed to prove that his cervical and upper extremity problems were attributable to

something that happened during the lumbar surgery. Claimant appeals that finding. The nature and extent of claimant's disability is the only issue for Appeals Board review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This case turned upon whether or not claimant made complaints of arm and shoulder pain during the period immediately after his surgery. Claimant testified that he did and Dr. Amundson agreed with claimant. After his release from the hospital following surgery Dr. Amundson's April 29, 1997 office notes confirm that claimant was still experiencing upper extremity symptoms and that claimant described the surgery as the time of onset of these symptoms. The evidence to the contrary is the absence of these complaints in Dr. Amundson's earlier records and various speculation about possible causes for the injury, other than positioning during the surgery. Claimant's testimony is not overcome by speculation that his injury could have been caused in some way other than as described. Dr. Amundson testified that in his opinion more probably than not something occurred during the surgery to cause claimant's injury, most likely positioning. He relies, in part, upon claimant's assertions that he made complaints immediately after surgery. Dr. Amundson recalls that these complaints were voiced to him by claimant. He explains why they may not have been noted in his records and is comfortable with the fact that claimant made the complaints and he did not always record them. Dr. Amundson is confident, based not only upon statements made to him later by claimant but also upon his independent recollection, that such complaints were made. The Board accepts this testimony as true. Dr. Amundson's April 29, 1997 office notes reflect complaints relative to claimant's cervical spine, right shoulder and right upper extremity. Claimant relates the onset of these symptoms to the surgery. The claimant's testimony is credible.

The surgical procedure lasted nine hours. Claimant's large size caused problems with positioning and adjustments had to be made to accommodate claimant. The hospital records confirm that claimant reported pain in his right shoulder, arm and thumb soon after the surgery. These complaints are recorded in the nurse's notes. Claimant remained hospitalized for four days after surgery. Dr. Amundson recalls claimant telling him about some upper extremity symptoms during this time. Dr. Amundson thought these symptoms were positional and would resolve. The symptoms did not resolve and claimant was eventually diagnosed with a cervical disc herniation at the C2-3 level. Claimant had no right shoulder, arm or hand symptoms before surgery. In the opinion of Dr. Amundson, this condition was related to the hospitalization for the surgery and although he could not say so to a medical certainty, he considered the positioning of claimant during surgery to be the most likely cause.

It would be helpful and would certainly make the trier of facts job easier if Dr. Amundson had made contemporaneous notes of claimant's upper extremity complaints. But he did not. Even though he did not, Dr. Amundson's testimony supports claimant's, both as to complaints having been made and causation. Furthermore, the nurse's notes document claimant's post-operative upper extremity complaints. Even

Dr. Koprivica agrees that if the facts are as testified to by claimant and Dr. Amundson then the cervical spine was aggravated in surgery. The Appeals Board finds claimant's cervical injury is compensable as a natural and direct consequence of medical treatment for his work-related injury.<sup>1</sup>

Based upon the aggravation to claimant's low back and neck injuries, Dr. Koprivica issued a functional impairment rating of an additional 18 percent pursuant to the AMA Guides Third Edition, Revised. Utilizing the combined values chart this 18 percent rating combines with the original 14 percent for a 29 percent permanent partial disability.

The Board, like the ALJ, will use the functional impairment ratings given by Dr. Koprivica because they were issued pursuant to the AMA Guides, Third Edition, Revised, as opposed to Dr. Amundson's ratings which were pursuant to the Fourth Edition. As claimant's aggravation is found to be a direct and natural consequence of the original injury, the date of the original injury controls what law and hence what edition of the Guides is to be used.<sup>2</sup> Were the aggravation found to be a new accident, then Dr. Amundson's use of the Fourth Edition would have been proper.

Respondent's argument that any aggravation should be treated as a new accidental injury under Helms<sup>3</sup> is rejected because the Board does not consider medical treatment to constitute a separate trauma and does not, therefore, require the filing of an additional claim.<sup>4</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award entered by Administrative Law Judge Bryce D. Benedict dated July 26, 1999, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jeffery Simmons, and against the respondent, Flint Hills Job Corps, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred October 26, 1994. Claimant is entitled to 29.57 weeks of temporary total disability

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<sup>1</sup> See, Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Roberts v. Krupka, 246 Kan. 433, 790 P.2d 422 (1990); Taylor v. Centex Construction Co., 191 Kan. 130, 379 P.2d 217 (1963).

<sup>2</sup> K.S.A. 44-510e(a).

<sup>3</sup> Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

<sup>4</sup> See, Roberts, at 442; Stockman v. Goodyear, 211 Kan. 260, 505 P.2d 697 (1973); Graber v. Crossroads Cooperative Ass'n, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

compensation at the rate of \$248.14 per week or \$7,337.50, followed by 56.06 weeks at the rate of \$248.14 per week or \$13,910.73, for a 14% permanent partial general disability, followed by 60.06 weeks for the period after March 18, 1997, at the rate of \$248.14 per week or \$14,903.29, for a 29% permanent partial general disability, making a total award of \$36,151.52, which is ordered paid in one lump sum minus any amounts previously paid.

The Board adopts the remaining orders set forth in the Award Review and Modification to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Rodney C. Olsen, Manhattan, KS  
Gregory D. Worth, Lenexa, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director